

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in April 2012

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: DISMISSAL ORDER; MOTION TO DISMISS; CONSOLIDATION;
TEMPORARY EMPLOYEE; TERMINATION; STANDING

CASE STYLE: DIXON v. WEST VIRGINIA UNIVERSITY
DOCKET NO. 2012-1031-CONS (4/6/2012)

PRIMARY ISSUES: Whether Grievant, as a temporary employee, had standing to file a grievance.

SUMMARY: Grievant was hired as a temporary employee. Temporary employees are not afforded the statutory right to file a grievance.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	SUSPENSION; FELONY; CRIMINAL CHARGES; INDICTED; RATIONAL NEXUS; MINOR; TEACHER; SEXUAL CONDUCT
<u>CASE STYLE:</u>	<u>ADKINS v. CABELL COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2012-0085-CABED (4/26/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent had authority to suspend Grievant indefinitely without pay pending the resolution of the criminal charges.
<u>SUMMARY:</u>	Grievant was suspended indefinitely without pay from his employment because he was charged with eleven felonies. Grievant argues that Respondent lacked the statutory authority to suspend him as a result of the criminal charges because “being charged with a felony” is not one of the grounds for suspension listed in West Virginia Code § 18A-2-8. Respondent asserts that it has the authority to suspend Grievant indefinitely without pay pending resolution of his criminal charges. Respondent has met its burden of proof; therefore, this grievance is DENIED.

<u>KEYWORDS:</u>	TEACHER; CLASS POLICY; STUDENT'S GRADE; CLASSROOM CONDUCT
<u>CASE STYLE:</u>	<u>MANON v. FAYETTE COUNTY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION</u> DOCKET NO. 2011-1238-FAYED (4/30/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent violated W. Va. Code § 18-5-46 when it directed Grievant, a teacher, to accept a student's project and assign a grade.
<u>SUMMARY:</u>	Grievant, a high school teacher, contends her principal's action of directing her to grade a student's assignment was a violation W. Va. Code § 18-5-46. Grievant did not establish Respondent's actions constituted an unlawful action. It is not found that the principal unlawfully directing a student's grade be changed. The administrator was directing a reasonable application of “class policy” dealing with late work in such a way as to not be arbitrary, nor unduly punitive and in accordance with his duty under W. Va. Code § 18A-2-9. Grievant was instructed to accept the project and assign a grade. Grievant did not establish Respondent's actions constituted directing a teacher to change a student's grade in violation of W. Va. Code § 18-5-46. Grievance DENIED.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	DISMISSAL ORDER; CONTRACT; TIMELINESS; ADVISORY OPINION; RELIEF
<u>CASE STYLE:</u>	<u>LAWTON v. HANCOCK COUNTY BOARD OF EDUCATION AND TEENA SMITHBAUER, INTERVENOR</u> DOCKET NO. 2011-1081-HANED (4/18/2012)
<u>PRIMARY ISSUES:</u>	Whether the grievance stated a claim upon which relief could be granted and whether the grievance was timely filed.
<u>SUMMARY:</u>	Grievant was assigned to a mid-day bus run at the beginning of the school year. In November 2010, this run was re-assigned to a less senior Aide at Grievant's request, resulting in Grievant working fewer than seven hours, while being paid under a seven hour contract, and the less senior Aide often working more than seven hours, and earning additional pay when she did so. When Grievant became aware that the less senior Aide was earning additional pay, she then asked to be returned to the mid-day run and to be paid for more than seven hours. The only reason Grievant seeks to be returned to the mid-day run which she had voluntarily left, is because she wants to be paid for more than seven hours a day. However, due to her regular morning and afternoon assignments being shorter than those of the Aide working the mid-day run, Grievant would not be working more than seven hours a day were she to be returned to the mid-day assignment, and would not be entitled to additional pay. The relief requested by Grievant is not available. A timeliness defense was also raised, but was not proven. Accordingly, this grievance is DISMISSED.

KEYWORDS: EMPLOYMENT CONTRACT; DISCRIMINATION; SIMILARLY SITUATED; LIKE ASSIGNMENT AND DUTIES; UNIFORMITY

CASE STYLE: GRIFFITH v. RALEIGH COUNTY BOARD OF EDUCATION
DOCKET NO. 2011-0247-RALED (4/30/2012)

PRIMARY ISSUES: Whether is was discriminatory or a uniformity violation for Grievant to be employed under a 240-day contract while her co-workers were employed under a 261-day contract.

SUMMARY: Grievant asserts that she performs like assignments and duties as two of her co-workers. Grievant argues that the failure of Respondent to provide her with the same 261-day contract constitutes unlawful discrimination and violates uniformity provisions. Respondent demonstrated that the co-workers and Grievant do not perform like assignments and duties. Consequently, the grievance is DENIED.

KEYWORDS: EXTRA-DUTY ASSIGNMENTS; MULTI-CLASSIFICATIONS; SENIORITY; OVERTIME; ROTATION LIST; DISCRIMINATION; FAVORITISM; NEXT IN LINE

CASE STYLE: MYERS v. MONONGALIA COUNTY BOARD OF EDUCATION
DOCKET NO. 2011-1487-MONED (4/11/2012)

PRIMARY ISSUES: Whether Grievant proved that he was “next in line” on the rotation list to work overtime or that he was the victim of discrimination or favoritism.

SUMMARY: Grievant asserted that Respondent was not following the rotation list in assigning overtime (extra-duty) work. Grievant demonstrated that on one occasion, his supervisor allowed the employees working on a long-term project to work overtime hours one day to finish the project, rather than going down the rotation list to see who was next on the rotation, possibly resulting in someone unfamiliar with the project working the overtime hours. Grievant did not demonstrate he was next in line to work the overtime on this one occasion, had his supervisor consulted the rotation list. Accordingly, this grievance is DENIED.

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STATE EMPLOYEES

<u>KEYWORDS:</u>	DISCRIMINATION; REPRISAL; WORKERS' COMPENSATION; TEMPORARY TOTAL DISABILITY BENEFITS; MEDICAL LEAVE OF ABSENCE; INSURANCE PREMIUM; HOSTILE WORK ENVIRONMENT
<u>CASE STYLE:</u>	<u>STUART v. DIVISION OF JUVENILE SERVICES/LORRIE YEAGER JR. JUVENILE CENTER</u> DOCKET NO. 2011-0970-MAPS (4/13/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent's decision to cease payment of the employer portion of Grievant's insurance premiums constitutes discrimination pursuant to West Virginia Code sections 23-5A-1 and 23-5A-2, whether such action constituted reprisal, and whether Respondent actions constituted bad faith.
<u>SUMMARY:</u>	After Grievant had been on a medical leave of absence without pay for one year, Respondent ceased paying the employer portion of Grievant's insurance benefits. Thereafter, Grievant's insurance coverage was canceled for nonpayment. In this action, Grievant asserts a number of claims against Respondent regarding its decision to cease paying the employer portion of his insurance premiums, such as discrimination in violation of certain workers' compensation statutes and retaliation. Grievant also argues that Respondent created a hostile work environment by issuing and failing to lift a "no-contact order" against him and by failing to timely provide him with requested documents and other information. Lastly, Grievant claims that many of Respondent's actions during the litigation of this grievance constitute bad faith. Respondent denies all of Grievant's allegations and asserts that it lawfully ceased payment of the employer portion of Grievant's insurance premiums. Grievant failed to prove each of his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

<u>KEYWORDS:</u>	DISMISSAL ORDER; MOTION TO DISMISS; MOOT; FAILURE TO PURSUE
<u>CASE STYLE:</u>	<u>ROMAN v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HOPEMONT HOSPITAL</u> DOCKET NO. 2011-0389-CONS (4/9/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant abandoned her grievance.
<u>SUMMARY:</u>	Respondent moves the Grievance Board to dismiss the grievances as the Grievant appears to have abandoned her grievances. In addition, Grievant has failed to pursue her grievance after the matter was scheduled by the Grievance Board for a level three hearing on at least two occasions. Grievant's whereabouts are also unknown. The Administrative Law Judge gave Grievant and her representative ample time to respond to this motion, and provide a status update. None was forthcoming. The Administrative Law Judge granted the motion to dismiss.

<u>KEYWORDS:</u>	DISMISSAL ORDER; STANDING; EMPLOYEE; TEMPORARY EXEMPT EMPLOYEE; TERMINATION; PERMANENT EMPLOYEE
<u>CASE STYLE:</u>	<u>SUTTON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL</u> DOCKET NO. 2012-0795-DHHR (4/11/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant, as a temporary exempt employee, had standing to file a grievance.
<u>SUMMARY:</u>	Grievant was hired as a 720 hour temporary exempt employee. Temporary employees are not afforded the statutory right to file a grievance. Accordingly, the Grievance is DISMISSED.

KEYWORDS: MEDICAL CONDITION; RESTRICTIONS; ACCOMMODATIONS; PHYSICIAN'S STATEMENT; LESS THAN FULL DUTY

CASE STYLE: POWELL v. DIVISION OF HIGHWAYS

DOCKET NO. 2010-0261-DOT (4/30/2012)

PRIMARY ISSUES: Whether Respondent had the authority to refuse to allow Grievant to return to work.

SUMMARY: Grievant has been diagnosed with chronic obstructive pulmonary disease, and had received some accommodations from Respondent in order to be able to perform his job duties. Grievant's doctor sent Respondent a subsequent note indicating further restrictions. Thereafter, Respondent discontinued the assignment that required Grievant flag traffic as an accommodation. Respondent requested additional information from Grievant's doctor, and refused to let him return to work until this information was provided. Respondent had the right to require additional information before deciding whether Grievant should be allowed to return to work. Accordingly, this grievance is DENIED.

KEYWORDS: PROBATIONARY EMPLOYMENT, LEAVE ABUSE, HOSTILE WORK ENVIRONMENT, UNSATISFACTORY ATTENDANCE, MISCONDUCT, DISMISSAL, TERMINATION

CASE STYLE: FRALEY v. CLAY COUNTY HEALTH DEPARTMENT

DOCKET NO. 2012-0319-CONS (4/2/2012)

PRIMARY ISSUES: Whether the dismissal of Grievant from her probationary employment was lawful.

SUMMARY: A probationary appointment is a trial period giving the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of the position and to assess suitability with the organization and programs of the agency. Grievant has failed to demonstrate Respondent is in violation of any known rule or regulation applicable to this situation. Grievant did not establish Respondent's actions were unlawful. Respondent choose not to permanently employ Grievant, dismissing her from probationary employment. Grievant was dismissed from her probationary employment as a Breastfeeding Peer Counselor after a time period in which she had exhausted her accrued leave balances and participated in stimulated discussion(s) with a supervisor regarding leave usage, agency expectations and employee performance. This grievance is DENIED.

<u>KEYWORDS:</u>	TERMINATION; DRIVER'S LICENSE, REVOKED; DISCRIMINATION; WORKERS' COMPENSATION; DUI; MITIGATION; SIMILARLY SITUATED
<u>CASE STYLE:</u>	<u>CONN v. DIVISION OF HIGHWAYS</u> DOCKET NO. 2011-0673-DOT (4/6/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant failed to meet the minimum qualifications of his job which led to his termination and whether he was discriminated against.
<u>SUMMARY:</u>	<p>Respondent argues that Grievant was properly terminated for failure to meet the minimum qualifications of his job. Grievant asserts that "management failed to meet the elements of just cause" when terminating him. Grievant argues that he was treated differently than similarly situated employees. Grievant also asserts mitigation of penalty is warranted. Grievant was employed as a Transportation Worker 2. One of the specific qualifications of the position is possession of a driver's license. As Grievant's driver's license was revoked, it is clear he was unable to perform the essential duties of the position. Respondent has met its burden in this disciplinary matter. Grievant failed to demonstrate that he was being treated differently from one or more similarly situated employees. Respondent has dismissed other employees guilty of revocation of their required driver's license due to a charge of driving under the influence of alcohol. Grievant failed to establish discrimination. Additionally, Grievant failed to prove that the penalty he received was so disproportionate to his offense that it indicates an abuse of discretion. Consequently, Grievant failed to demonstrate that mitigation of penalty is warranted. Accordingly, this grievance is DENIED.</p>

KEYWORDS:

TERMINATION; JOB DUTIES; WORK PERFORMANCE;
PERFORMANCE EVALUATION; UNSATISFACTORY;
PERMANENT EMPLOYEE; GOOD CAUSE

CASE STYLE:

SMITH v. CLAY COUNTY HEALTH DEPARTMENT

DOCKET NO. 2012-0451-CLACH (4/17/2012)

PRIMARY ISSUES:

Whether Grievant's failure and/or inability to perform critical administrative duties of his position demonstrated good cause for dismissal from employment.

SUMMARY:

Respondent dismissed Grievant from his position of Local Health Administrator citing unacceptable job performance. Grievant contends training and evaluation deficiencies by Respondent. Grievant argues any unsatisfactory job performance was casually related to Respondent's failure to follow West Virginia Division of Personnel policy. Respondent established by a preponderance of the evidence that Grievant's performance of his identified and duly assigned duties were unsatisfactory. Respondent demonstrated good cause for Grievant's dismissal. Grievance DENIED.